

United States  
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Circuit Court of Appeals

For the Ninth Circuit.

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GEORGE U. HIND and JAMES ROLPH, Jr.,  
Plaintiff in Error,  
vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

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FILED

JUL 14 1921

F. D. MONCKTON,  
CLERK.



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Circuit Court of Appeals  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Answer .....	9
Assignment of Errors .....	43
Bond on Writ of Error.....	46
Certificate of Clerk U. S. District Court to Transcript of Record .....	50
Citation on Writ of Error.....	53
Complaint .....	1
Judgment .....	37
Names and Addresses of Attorneys of Record.	1
Opinion .....	38
Order Allowing Writ of Error.....	44
Petition for Writ of Error.....	42
Praecipe for Record on Writ of Error.....	49
Return to Writ of Error.....	53
Stipulation as to Bill of Exceptions.....	45
Stipulation as to Certain Facts.....	32
Stipulation as to Facts.....	23
Writ of Error .....	51



**Names and Addresses of Attorneys of Record.**

Messrs. ANDROS & HENGSTLER, Attorneys for  
Plaintiffs in Error,

Kohl Building, San Francisco, California.

BEVERLY L. HODGHEAD, Esq., Attorney for  
Defendant in Error,

58 Sutter Street, San Francisco, California.

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In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

No. 16,059.

GEORGE U. HIND and JAMES ROLPH, Jr.,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Defendant.

**Complaint.**

Now come plaintiffs above named and complain of  
defendant and for cause of action allege:

I.

That at all the times herein mentioned plaintiff  
George U. Hind was and now is a resident of the  
City of San Rafael, Marin County, said Northern  
District of California, and a citizen of the State  
of California; that at all of said times plaintiff  
James Rolph, Jr., was and now is a resident of the  
said City and County of San Francisco, said North-

ern District of California, and a citizen of the State of California; that at all of said times said plaintiffs George U. Hind and James Rolph, Jr., were and now are copartners doing a general shipping and commission business in the said City and County of San Francisco, said Northern District of California, under the firm name and style of Hind, Rolph & Co., being duly authorized thereunto by the laws of the said State of California.

## II.

That at all times herein mentioned defendant Western Union Telegraph Company was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of the said State of New York.

## III.

That at all times herein mentioned said defendant was [1\*] organized for and regularly engaged in, among other things, the business of receiving, transmitting and delivering communications and messages for the general public for hire between various places and states within the United States, and between the City of London, England, and said places and states, including the receipt, transmission and delivery of communications and messages between the said City of London, England, and the said City of San Francisco, for the general public for hire.

## IV.

That prior to February 25, 1916, F. Green & Co., at the said City of London, England, were negotiating, in behalf of said plaintiffs, for the sale of a

\*Page-number appearing at foot of page of original certified Transcript of Record.



cargo of Superior barley per the French vessel "La Rochejaquelin"; that, on said 25th day of February, 1916, said F. Green & Co. filed in the office of said defendant in the said City of London, England, and prepaid all the charges then and there demanded by defendant, and said defendant then and there accepted and undertook to properly transmit and deliver a message to said plaintiffs in said City of San Francisco, in the words and figures following:

Larochejaquelein buyers decline offer subject immediate reply sixty two not east Southampton Sixty two and six not North Ipswich including war risk considerably best offer yet made this position.

V.

That said defendant transmitted and delivered said message with such lack of reasonable care and diligence and with such gross negligence that in the course of the transmission and delivery of said message it became altered and added to and was delivered to said plaintiffs on the said 25th day of February, 1916, in an altered form, to wit, in the words and figures following:

Larochejaquelein buyers decline offer subject immediate reply sixty two not east Southampton sixty two and six not North Ipswich not including war risk considerably best offer yet made this position. [2]

VI.

That said plaintiffs were without notice or reason to believe that the message so delivered to them as aforesaid was altered or incorrect or other than as

delivered by said F. Green & Co. to defendant for transmission and delivery; that said plaintiffs reasonably believed the said message, as delivered to them as aforesaid to be correct and unaltered, and in every respect the same as the message delivered by said F. Green & Co. to defendant in London for delivery as aforesaid; that said plaintiffs reasonably relied upon the contents of the said message so delivered to them as aforesaid as being the same terms as those contained in the message which F. Green & Co. had delivered to defendant for transmission and delivery to plaintiffs; that the message delivered by said F. Green & Co. to defendant for transmission and delivery to plaintiffs, as described and set out in Article IV above, did contain the true and correct terms of the offer it purported to set out; that said plaintiffs, reasonably relying upon the correctness of the contents of the message received by them as aforesaid, on the said 25th day of February, 1916, cabled the said F. Green & Co. in the said City of London, England, and in said cable directed the said F. Green & Co. to accept on behalf of plaintiffs the offer transmitted to them in the said message received by plaintiffs; that said F. Green & Co., on behalf of plaintiffs, did accordingly forthwith accept the said offer and bind said plaintiffs to a contract; that the material terms of said contract are as set out in the message delivered by said F. Green & Co. to defendant for transmission and delivery to plaintiffs as in Article IV hereof set forth.

## VII.

That the contract which said plaintiffs became

bound to perform as aforesaid and which thereafter they did perform, contained as one of its terms the provision that plaintiffs must [3] provide war risk on the said cargo of Superior barley per "La Rochejaquelin"; that in consequence of defendant's lack of reasonable care and diligence and defendant's gross negligence in altering and adding to, or permitting an alteration in or addition to be made to during the course of transmission and delivery as aforesaid, the contents of the said message of F. Green & Co. to plaintiffs as aforesaid, contrary to the direction of said F. Green & Co., and in consequence of defendant's delivery to plaintiffs of a message different from the message which it had received, said plaintiffs reasonably believed that this particular term of the said proposed contract was the direct opposite of the term intended by said F. Green & Co. and by the makers of said offer, to wit, that the offerors as vendees proposed and offered to provide the said war risk on the said cargo of Superior barley.

#### VIII.

That the said term requiring plaintiffs to provide war risk on the said cargo of Superior barley placed a great burden and liability upon said plaintiffs, which plaintiffs did not wish to assume and would not have assumed had they known that defendant had altered the said message; that said plaintiffs would not have accepted said offer, or any offer of similar terms, or made any contract for the said cargo of Superior barley, had they been advised that the real offer as contained in the message de-

livered to defendant by F. Green & Co., contained the said objectional term as aforesaid; that the said plaintiffs would not have sold the said cargo of Superior barley to the said offerors, or to anyone, on the terms contained in their offer as set out correctly in the message delivered by F. Green & Co. to the defendant; that said plaintiffs authorized and directed said F. Green & Co. to enter into the said contract in said plaintiffs' behalf solely because of their being misled and deceived as to its correct terms by the act of defendant; that the [4] offer as correctly set out in the message delivered by F. Green & Co. to defendant did not represent a fair and reasonable compensation and return to said plaintiffs for said cargo of Superior barley; that, due to defendant's act as aforesaid in transmitting and delivering the said message from F. Green & Co. to said plaintiffs, said plaintiffs became obligated against their wish to provide war risk on the said cargo of Superior barley as a part of the said contract of sale, and said plaintiffs would not have permitted themselves to become so obligated and would not have become so obligated had it not been for the acts of defendant as aforesaid in transmitting and delivering said message as aforesaid, thereby misleading, misinforming and deceiving said plaintiffs as aforesaid.

## IX.

That, at the time when plaintiffs made said contract for the sale of the cargo of said steamer, it was customary, prudent and commercially necessary to provide war risk on said cargo of said French ship

by taking out insurance thereon; that said plaintiffs so advised defendant and, before providing said war risk, notified said defendant of all the facts and circumstances surrounding the said matter, and called upon defendant to provide proper war risk, but that said defendant neglected and refused to supply the same; that said plaintiffs thereupon, in order to mitigate their damages, secured such insurance, to cover said war risk on said cargo; that said plaintiffs paid as a premium on the said insurance, the sum of Sixty-nine Hundred Seventy and  $54/100$  Dollars (\$6970.54); that the said plaintiffs kept themselves informed as to the rates of insurance on war risks, and that the said premium so paid was reasonable and proper and the most favorable obtainable; that, in order adequately to protect the said cargo and to mitigate damages, it became reasonably necessary to take out the said insurance and pay the said premium on the 24th day of October, 1916. [5]

X.

That due to the acts of defendant as aforesaid in connection with the transmission and delivery of the said message accepted by defendant for transmission and delivery as aforesaid, said plaintiffs have been damaged as aforesaid in the said sum of Sixty-nine Hundred Seventy and  $54/100$  Dollars (\$6970.54), together with interest from and after the said 24th day of October, 1916; that neither the whole nor any part of the said sum has ever been paid by defendant, though often demanded, and that the whole thereof is now unpaid and owing to said plaintiffs from said defendant.

WHEREFORE, plaintiffs pray for judgment against defendant in the sum of Sixty-nine Hundred Seventy and 54/100 Dollars (6970.54), with interest thereon from the 24th day of October, 1916, and plaintiffs' costs of suit, and for such other and further relief as may be meet and proper in the premises.

ANDROS & HENGSTLER,  
Attorneys for Plaintiffs.

State of California,  
City and County of San Francisco,—ss.

James Rolph, Jr., being first duly sworn, deposes and says: That he is one of the plaintiffs in the within entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matter therein stated on information or belief, and as to those matters he believes the same to be true.

JAMES ROLPH, Jr.

Subscribed and sworn to before me this 22d day of March, A. D. 1917.

[Seal]

S. I. CLARK,

Notary Public in and for the City and County of  
San Francisco, State of California. [6]

[Endorsed]: Filed Mar. 23, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

(Title of Court and Cause.)

**Amended Answer.**

Now comes the defendant and by leave of Court first had and obtained, files this its amended answer to the complaint of plaintiffs herein, and answers said complaint as follows:

I.

Answering paragraph I of said complaint, the defendant says that it has no information or belief sufficient to enable it to answer the averments, or any thereof, contained in paragraph I of said complaint, and basing its denial thereof upon that ground, denies each and all of said allegations and each and every part thereof.

II.

Answering paragraph V of said complaint, defendant denies that the said error alleged to have been committed in the course of the transmission of said message occurred through any gross negligence or lack of reasonable care or diligence of this defendant, but, on the contrary, says that such alleged error is one which may commonly occur in the transmission of unrepeatd telegraph messages over long distances, as set forth in said complaint, notwithstanding the exercise of great diligence and care, and in this behalf defendant further alleges that said word "not" was inserted between the words "Ipswich" and the word "including" in the third line of said message, by slight inadvertence and oversight of the operator and by no greater degree of negligence or lack of care; that said inadvertence

or oversight was caused by the fact that the word "not" also occurred in the second line of said message between the words "two" and "East Southampton," being almost immediately above the point of the insertion of said word in the third line of [8] said message, and the repetition of said word was not observed by said operator.

### III.

Answering paragraph VI of said complaint, this defendant denies that plaintiffs were without notice or reason to believe that the message so delivered to them as alleged in said complaint was altered or incorrect or other than as delivered by F. Green & Co. to defendant for transmission and delivery; but, on information and belief, alleges that said plaintiffs did not believe the said message so delivered to them to be correct and unaltered, or correct or unaltered, or in every respect the same as the message delivered by said F. Green & Co. to defendant in London for delivery, as alleged in said complaint; denies that the plaintiffs reasonably relied upon the contents of said message so delivered to them as being the same terms as those contained in the message which F. Green & Co. had delivered to defendant for transmission and delivery to the plaintiffs; denies that said plaintiffs in cabling said F. Green & Co., directing them to accept said offer transmitted to them in the said message received by plaintiffs, reasonably relied upon the correctness of the contents of said message, but, on the contrary, alleges that said plaintiffs had reason to believe that an error had been committed in the transmission of said



telegram and that said message so delivered to the plaintiffs in the form as set out in said complaint had been altered in the course of the transmission thereof and that said message was not in the same terms as those contained in the message which said F. Green & Co. had delivered to defendant for transmission and delivery to the plaintiffs, and in particular this defendant specifies and alleges in this behalf as follows: That on the 24th day of February, 1916, plaintiffs filed with this defendant at San Francisco and caused to be transmitted and delivered to said F. Green & Co. at London, England, a [9] message containing an offer to sell said cargo of superior barley referred to in said complaint, at the rate of 63 shillings, 9 pence, including war risk to be paid by seller; that in reply to said offer of sale, said message as set forth in paragraph V of said complaint, was delivered to the plaintiffs in San Francisco which, by the terms thereof the buyers declined said offer and purported to offer to purchase said cargo at the rate of 62 shillings with war risk to be paid by buyer, which offer for said cargo of barley was about the sum of \$1,000 more than the offer which said buyers had declined and that said plaintiffs were then put upon inquiry by means of said messages as to whether or not said cablegram sued on in this action was correct; that defendant is informed and believes, and upon such information and belief alleges that said plaintiffs made no inquiry and took no steps to ascertain the correctness of said telegram, but accepted said offer, if the same was accepted by plaintiffs, with notice

and information that an error had been committed in the transmission of said message.

Further answering said paragraph VI of said complaint wherein it is alleged "that said F. Green & Co., on behalf of plaintiffs, did accordingly forthwith accept the said offer and bind said plaintiffs to a contract; that the material terms of said contract are as set out in the message delivered by said F. Green & Co. to defendant for transmission and delivery to plaintiffs as in Article IV hereof set forth," this defendant says that it has no information or belief sufficient to enable it to answer the aforesaid averments of said complaint, and basing its denial thereof upon that ground, denies that said F. Green & Co. on behalf of plaintiffs did accordingly or at all accept said offer or bind said plaintiffs to said contract, and denies that the material terms of said contract are as set out in said message delivered by said F. Green & Co. as set forth in said complaint, or that any contract accepting said offer was made for or on behalf of plaintiffs herein. [10]

#### IV.

Answering paragraph VII of said complaint, the defendant says that it has no information or belief sufficient to enable it to answer the averments, or any thereof, contained in paragraph VII of said complaint, and basing its denial thereof upon that ground, denies each and all of said allegations and each and every part thereof.

#### V.

Answering that portion of paragraph VIII of said complaint wherein it is alleged: "That the said

term requiring plaintiffs to provide war risk on the said cargo of superior barley placed a great burden and liability upon said plaintiffs, which plaintiffs did not wish to assume and would not have assumed had they known that defendant had altered the said message; that said plaintiffs would not have accepted said offer, or any offer of similar terms, or made any contract for the said cargo of superior barley, had they been advised that the real offer as contained in the message delivered to defendant by F. Green & Co., contained the said objectional term as aforesaid; that the said plaintiffs would not have sold the said cargo of superior barley to the said offerors, or to anyone, on the terms contained in their offer as set out correctly in the message delivered by F. Green & Co. to the defendant"; defendant says that it has no information or belief sufficient to enable it to answer said averments of said complaint, and basing its denial thereof upon that ground, denies each and all of said allegations and each and every part thereof.

Defendant further denies that the plaintiffs authorized and directed, or authorized or directed, said F. Green & Co. to enter into said alleged contract, if at all, in plaintiffs' behalf, solely because of their being misled and deceived, or misled or deceived, as to the correct terms thereof by the act of this defendant, and in this connection denies that plaintiffs were misled or deceived as to the correctness of said message, [11] but, on the contrary, alleges that the plaintiffs had ample and sufficient notice that an error had been committed in the

transmission thereof as hereinbefore in this answer more particularly set forth.

Defendant further denies that the offer, as correctly set out in the message delivered by said F. Green & Co. to defendant, did not represent a fair and reasonable, or fair or reasonable compensation and return to plaintiffs for said cargo of superior barley, but, on the contrary, alleges that said offer, as set out in the said message delivered by said F. Green & Co. and filed with this defendant for transmission, as set out in paragraph IV of said complaint, was a fair and reasonable offer and compensation and return for said cargo of superior barley, and was the full, fair and reasonable price therefor, and was much greater than the price which plaintiffs could at said time have obtained for said cargo of barley in the city of San Francisco, California, and in excess of the market value of said barley in the City of London, England, where said message was filed and where said sale is alleged to have been made.

Denies that due to the defendant's act, as alleged, in transmitting and delivering said message from said F. Green & Co. to the plaintiffs, the plaintiffs became obligated against their wish to provide war risk on said cargo of superior barley, as a part of said alleged contract of sale; denies that the plaintiffs were misled or deceived by the contents of said message, but, on the contrary, says that plaintiffs were by the contents of said messages referred to herein, put upon notice that an error had been committed in the transmission thereof, and alleges that

plaintiffs discovered and were fully advised of the error in the transmission of said message before the shipment of said cargo of superior barley pursuant to said alleged contract of sale, and before the war risk alleged in said complaint to have been paid was incurred, provided, or secured.

Answering that portion of paragraph VIII of said complaint wherein it is alleged, "and said plaintiffs would not have permitted [12] themselves to become so obligated and would not have become so obligated had it not been for the acts of defendant, as aforesaid, in transmitting and delivering said message as aforesaid," defendant says it has no information or belief upon the subject sufficient to enable it to answer the same, and basing its denial upon that ground, denies that plaintiffs would not have permitted themselves to become obligated and would not have become obligated to sell said cargo of superior barley for the price offered in said message, as filed by F. Green & Co. and set forth in paragraph IV of said complaint, had said error in the transmission of said message not been made.

#### VI.

Answering paragraph IX of said complaint, the defendant says, that it has no information or belief sufficient to enable it to answer the averments, or any thereof, contained in paragraph IX of said complaint, and basing its denial thereof upon that ground, denies each and all of said allegations and each and every part thereof.

## VII.

Answering paragraph X of said complaint, defendant denies that due to the acts of defendant in connection with the transmission and delivery, or transmission or delivery of such message, as set forth in said complaint, or at all, said plaintiffs have been damaged in said alleged sum of \$6,970.54, or in any sum whatever or at all, but, on the contrary, alleges that notwithstanding said alleged error in the transmission of said cablegram and the alleged acceptance thereof complained of, and the payment of said war risk, these plaintiffs, by the sale of said cargo of superior barley, received and derived a clear profit of \$28,000, or thereabouts, after the payment of the cost of said cargo of barley and all freights, charges, insurance, war risk, and every other expense connected with said transaction.

And for a further and separate defense the defendant alleges as follows: [13]

## I.

That said message referred to in paragraph IV of said complaint and set forth therein, was filed with this defendant at its office in the city of London, England, on the 25th day of February, 1916, by F. Green & Co. as agents of the plaintiffs herein, for transmission over the submarine cable and telegraph system of the defendant and delivered to plaintiffs at San Francisco in the State of California; that said message was filed by said F. Green & Co. in reply to a telegraphic message sent to plaintiffs by said F. Green & Co. on the 24th day

of February, 1916, making an offer of sale of said cargo of superior barley referred to in the said complaint, and requesting an answer thereto. That said message so filed by said F. Green & Co. on the 25th day of February, 1916, was accepted by this defendant for transmission, as herein set forth, and subject to the terms and conditions of a certain contract in writing printed upon the back of said message, and not otherwise, which said contract and the terms and conditions thereof were agreed to by the sender thereof and these plaintiffs, and among which terms and conditions of said contract were the following:

“All important Telegrams should be repeated, for which an additional quarter rate is charged.

**CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED IF IT BE HANDED IN AT AN OFFICE OF THE WESTERN UNION TELEGRAPH-CABLE SYSTEM.**

The Company will refund to the Sender the charges paid by him for any Telegraph which through the fault of the Telegraph Services has experienced serious delay or fails to reach the Addressee, or which owing to errors made in transmission has manifestly not fulfilled its object.

The Company shall not be liable to make compensation, beyond the amount to be refunded as above, for any loss, injury or damage, arising or resulting from the nontransmission or nondelivery of the Telegram, or delay, or error in the transmission or delivery thereof, however such nontransmission,

nondelivery, delay or error shall have occurred.”  
[14]

That upon the face of said message was printed the following condition and contract subscribed and assented to by said F. Green & Co., the sender of said message, as hereinbefore set forth:

“Having read the conditions printed on the back hereof, I request that the above telegram be forwarded by the Western Union Telegraph-Cable System, subject to the said conditions to which I agree.

F. GREEN & CO.

Signature—F. GREEN & CO.,

Address 13, Fenchurch Avenue, London,  
E. C.”

## II.

That by the Act of Congress entitled “An Act to Regulate Commerce, approved June 18th, 1910, (24 Stat. L. 379), relating, among other things, to telegraph companies and cable companies, communication by telegraph and cable between and among the several states and territories of the United States and to and from foreign countries, the Congress of the United States entered upon and assumed charge of regulating the field of communication by telegraph and cable between the several states of the United States and between foreign countries, and conferred upon the Interstate Commerce Commission full power over rates, charges, facilities, classifications and practices of such telegraph and cable companies in the transmission of interstate and foreign messages, and, in particular, conferred on the



Interstate Commerce Commission the power to approve, alter or acquiesce in existing rates and classifications, which power the said Commission has ever since retained and still retains. That by said Act of Congress it is specially provided that messages by telegraph subject to the provisions of said Act may be classified among other classes, into "repeated" and "unrepeated" messages, and that different rates may be charged for such different classes of messages. That by said Act it is further specially provided that all such messages shall be transmitted without discrimination, and without undue or unreasonable preference or advantage whatever for like service. [15]

### III.

That pursuant to the provisions of said Act of Congress relating to the classification of telegraph messages between the different states of the United States and foreign countries, the defendant had on and prior to the 25th day of February, 1916, established classifications of such telegraph messages into the various classes referred to in said Act, and among others into repeated and unrepeated messages, and had established different rates of toll with respect to such different classes of messages and that in and by said contract hereinbefore referred to and set forth herein, under which said message referred to in said complaint was accepted and transmitted, it is provided and notice given to the sender thereof, that messages may be transmitted between the several states of the Union and foreign countries in the form of a repeated message

and for a higher rate of toll, in consideration of which such repeated message will be transmitted back from the office of destination to the point of origin. That the repetition of such messages is intended to correct possible errors therein in transmission thereof, by advising the office at the point of origin whether said message has been correctly transmitted; that had said message been filed by said F. Green & Co. as a repeated message, the error complained of would not have occurred and the liability of the telegraph company for errors or delays in the transmission or delivery of such messages is fixed in said contract; and it is further provided in said contract that a message may be received and transmitted at a lower rate of toll as an unrepeated message, which, except as to the amount received for sending the same, shall be received, transmitted and delivered at the risk of the sender thereof.

#### IV.

That the said Interstate Commerce Commission, prior to and at the times of the filing of the message sued on herein, [16] and prior to the commencement of this action, had full knowledge of the rates, charges and classifications of messages and the transmission and conditions thereof established by the defendant, as above described, and the terms and conditions of said contract herein set forth, and with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications, regulations or contracts, and recognized the reasonableness

thereof and the right of defendant to charge a higher rate for a repeated message and a lower rate for an unrepeated message as in said contract and stipulations provided.

V.

That said message sued on in this action was a foreign message to be sent from London, England, to a point in the State of California, and as such was interstate and foreign commerce and subject to the provisions of said Act of Congress hereinbefore referred to; that said message was filed, as herein alleged, and was an unrepeated message, and defendant was not directed or requested to repeat the same; but was requested by sender thereof to transmit said message as an unrepeated message; that defendant received for said transmission and delivery thereof the sum of ten dollars and no more, which sum was defendant's ordinary and reasonable charge for the transmission and delivery of said message as an unrepeated message, under the conditions set forth in said contract, and that said sum was the rate charged for those messages only which are transmitted at the risk of the sender, as in said contract provided; that by the terms of said contract, subject to the conditions of which said message was filed and accepted for transmission, defendant was not to be liable for any loss, injury or damage arising from any error in such transmission beyond the said amount received for sending such unrepeated message.

VI.

That by reason of the premises and the said Act

of [17] Congress and of said contract, rules and regulations made in pursuance thereof and subject to which said message in said complaint referred to was accepted, transmitted and delivered, defendant ought not to be liable in this action, or in any event beyond the sum of ten dollars, the amount for sending the same, with interest thereon from the 25th day of February, 1916, to the present time.

WHEREFORE, defendant prays that plaintiffs take nothing by this action and that defendant have judgment for its costs, but in no event that judgment be given for plaintiffs for a greater sum than ten dollars.

BEVERLY L. HODGHEAD,  
Attorney for Defendant.

ALBERT T. BENEDICT, of New York,  
Of Counsel.

State of California,  
City and County of San Francisco,—ss.

M. T. Cook, being first duly sworn, deposes and says: That he is an officer of the Western Union Telegraph Company, defendant in the above-entitled action, to wit, the General Manager of the Pacific Coast Division thereof; that he has read the foregoing amended answer to said complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

M. T. COOK.

Subscribed and sworn to before me this 22d day of October, 1917.

[Seal] CHARLES E. REITH,  
Notary Public in and for the City and County of  
San Francisco, State of California.

Due service of the within amended answer is hereby admitted this 23d day of October, 1917, and it is hereby [18] stipulated that said amended answer may be filed.

ANDROS & HENGSTLER,  
Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 23, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

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(Title of Court and Cause.)

**(Stipulation as to Facts.)**

IT IS HEREBY STIPULATED that the following are the facts of the case, to wit:

I.

That at all the times herein mentioned plaintiff George U. Hind was and now is a resident of the city of San Rafael, Marin County, said Northern District of California, and a citizen of the State of California; that at all of said times plaintiff James Rolph, Jr., was and now is a resident of the said city and county of San Francisco, said Northern District of California, and a citizen of the State of California; that at all of said times said plaintiffs George U. Hind and James Rolph, Jr., were and now are copartners doing a general shipping and

commission business in the said city and county of San Francisco, said Northern District of California, under the firm name and style of Hind, Rolph & Co., being duly authorized thereunto by the laws of the said State of California.

II.

That at all times herein mentioned defendant, Western Union Telegraph Company, was and now is a corporation and existing under and by virtue of the laws of the State of New York, and a citizen of the said State of New York.

III.

That at all times herein mentioned said defendant was organized for and regularly engaged in, among other things, the business of receiving, transmitting and delivering communications and messages for the general public for hire between various places and states within the United States, and between the city of London, England, and said places and states, including the receipt, transmission and delivery of communications and messages between the said city of London, England, and the [20] said city of San Francisco, for the general public for hire.

IV.

That prior to the 24th February, 1916, F. Green & Co. at London, England, were negotiating in behalf of plaintiffs for the sale of a cargo of Superior Barley per the French vessel "La Rochejaquelein."

V.

That on the 24th February, 1916, plaintiffs filed

with the defendant for transmission, and defendant accepted for transmission, and transmitted and delivered to said F. Green & Co. a message as follows:

“Offer cargo Superior shipment ship ‘La Rochejaquelein’ sixty three shillings nine pence including war risk Charter extras account buyers subject immediate reply.”

Meaning thereby that said F. Green & Co. were to offer for sale on behalf of plaintiffs a cargo Superior Barley to be transported on the ship “La Rochejaquelein,” at sixty-three shillings and nine pence English money, per quarter, and that plaintiffs were to pay the war risk insurance upon said cargo.

## VI.

That on the 25th February, 1916, said F. Green & Co. filed with the defendant in the city of London, England, and prepaid the charges then and there demanded by defendant, and defendant then and there accepted and undertook to properly transmit and deliver a message to plaintiffs in San Francisco, California, in the words and figures following:

“La Rochejaquelein buyers decline offer subject immediate reply sixty two not east Southampton sixty two and six not north Ipswich including war risk considerably best offer yet made this position.”

Meaning thereby that the prospective buyers of said cargo declined the aforementioned offer, but made a counter offer subject to immediate reply to purchase the cargo of Superior Barley per ship

“La Rochejaquelein” at sixty-two shillings, if delivered not easterly of Southampton, and sixty-two shillings and six pence, English money, if delivered not north of Ipswich, but that plaintiffs were to pay the war risk insurance thereon but no [21] charter extras.

#### VII.

That said last-mentioned message was on said 25th day of February, 1916, correctly transmitted by defendant over its cable to the city of New York, and there transferred to the land lines of defendant for transmission and delivery to plaintiffs at San Francisco; that in transmitting said message over said land line, defendant inserted the word “not” between the words, “Ipswich” and “including,” and it was delivered to plaintiffs in San Francisco, so altered, on the 25th February, 1916, reading as follows:

“La Rochejaquelein buyers decline offer subject immediate reply sixty two not east Southampton sixty two and six not north Ipswich not including war risk considerably best offer yet made this position.”

That by the insertion of the word “not” between the words “Ipswich” and “including,” the meaning of said message was altered so as to convey to plaintiffs the offer that said buyers, and not the plaintiffs were to pay the war risk insurance thereon.

#### VIII.

On said 25th February, 1916, plaintiffs, relying upon the offer made in the message received, filed



with defendant for transmission to said F. Green & Co., London, and defendant accepted, transmitted and delivered to said F. Green & Co., a message as follows:

“Offer accepted cargo Superior shipment ship “La Rochejaquelein” provided you and our London bankers Lazard Freres consider buyers first class See them Must be no question about buyers’ responsibility.”

Meaning thereby that the plaintiffs accepted the offer as received by them as set forth in paragraph VII.

#### IX.

On the 25th February, 1916, said F. Green & Co. filed with defendant for transmission to plaintiffs, and defendant transmitted and delivered to plaintiffs the following message:

“La Rochejaquelein sale confirmed Buyers Ipswich Malting Company.” [22]

Meaning thereby that the sale so confirmed was that contained in the message set forth in paragraph VI, for sixty-two shillings and six pence per quarter.

#### X.

That plaintiffs thereafter delivered to said Ipswich Malting Company, the purchasers of said cargo, 15,105.50 quarters of Superior Barley per ship “La Rochejaquelein,” upon which sale the plaintiffs received and made a profit of \$30,000.

#### XI.

That there was no particular market price for Superior Barley on or about the 25th February,

1916, but the price stated on said message set forth in paragraph VI, was the best price which said F. Green & Co. could secure at that date.

XII.

That George U. Hind, one of the plaintiffs, if called as a witness, would testify that plaintiffs would not have accepted said offer set forth in the message set forth in paragraph VI, whereby plaintiffs were to pay said war risk insurance, had said message been transmitted to plaintiffs as filed by said F. Green & Co.

XIII.

That by reason of the acceptance aforesaid of the offer contained in the message as set forth in paragraph VII, the plaintiffs were thereafter required to and did pay the premium on the war risk insurance, amounting to \$6970.54 on the 24th day of October, 1916, which amount was the reasonable cost of such insurance.

XIV.

That said message referred to in paragraph VI hereof was filed with defendant at its office in London, England, on the 25th day of February, 1916, by F. Green & Co. as agents of the plaintiffs herein, for transmission and delivery over the submarine cable and telegraph system of the defendant to plaintiffs at San Francisco in the State of California; and upon the back of said message was printed the following condition and contract subscribed by said F. Green & Co., [23] the sender of said message, as hereinbefore set forth;

“Having read the conditions printed on the back hereof, I request that the above telegram be forwarded by the Western Union Telegraph-Cable System, subject to the said conditions to which I agree.

F. GREEN & CO.

Signature F. GREEN & CO., Address 13, Fenchurch Avenue, London, E. C.”

Upon the back of said message appeared the following:

“All important Telegrams should be repeated, for which an additional quarter rate is charged.

CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED IF IT BE HANDED IN AT AN OFFICE OF THE WESTERN UNION TELEGRAPH SYSTEM.

The Company will refund to the Sender the charges paid by him for any Telegram which through the fault of the Telegraph Services has experienced serious delay or fails to reach the Addressee, or which owing to errors made in transmission has manifestly not fulfilled its object.

The Company shall not be liable to make compensation, beyond the amount to be refunded as above, for any loss, injury or damage, arising or resulting from the nontransmission or nondelivery, of the Telegram, or delay, or error in the transmission or delivery thereof, however such nontransmission, nondelivery, delay or error shall have occurred.”

XV.

That the Court may take judicial notice of the Act of Congress entitled, “An Act to Regulate

Commerce, approved June 18th, 1910 (24 Stat. L. 379), relating, among other things, to telegraph companies and cable companies, communication by telegraph and cable between and among the several states and territories of the United States and to and from foreign countries, and of the rules and regulations of the Interstate Commerce Commission adopted pursuant thereto, and of the laws of the Kingdom of Great Britain and Ireland.

#### XVI.

That pursuant to the provisions of said Act of Congress relating to the classification of telegraph messages between the different states of the United States and foreign countries, the defendant had on and prior to the 25th day of February, 1916, established classifications of such telegraph messages into the various classes referred to in said Act, and among others, into repeated and unrepeated messages, and had established [24] different rates of toll with respect to such different classes of messages, and had filed said rates and regulations with said Interstate Commerce Commission.

#### XVII.

That said message was filed, as herein alleged, and was an unrepeated message, and defendant was not directed or requested to repeat the same; that defendant received for said transmission and delivery thereof the sum of ten dollars and no more, which sum was defendant's ordinary and reasonable charge for the transmission and delivery of said message as an unrepeated message, under the conditions set forth in said contract.

XVIII.

All legal objections are hereby reserved to the relevancy or materiality of any fact or testimony herein contained, and an exception to any ruling thereon is hereby reserved; upon the foregoing stipulation of facts each party does hereby move the court to enter a judgment in its favor, upon the grounds stated in the briefs respectively, and does hereby reserve an exception to an adverse ruling thereon; and each party does hereby request special findings.

XIX.

That on said 25th February, 1916, the rate of exchange between English money and money of the United States of America was one English pound of twenty shillings for \$4.76.

ANDROS & HENGSTLER,  
F. E. BOLAND,

Attorneys for Plaintiff.

BEVERLY L. HODGHEAD,  
Attorney for Defendant.

Approved.

FRANK H. RUDKIN,  
Judge.

[Endorsed]: Filed May 25, 1920. Walter B. Maling, Clerk. [25]

(Title of Court and Cause.)

**(Stipulation as to Certain Facts.)**

It is stipulated that the condition and contract referred to in section XIV of the stipulation of facts heretofore filed herein, is that contained on a printed form or blank; and that a copy of said printed form or blank is attached hereto and made a part hereof, consisting of two sheets, each of which represents one side of said form or blank; and that said message referred to in said paragraph XIV was put upon one of said forms or blanks and so filed with defendant for transmission.

ANDROS & HENGSTLER,  
Attorneys for Plaintiffs.  
BEVERLY L. HODGHEAD,  
Attorney for Defendant. [26]

WESTERN UNION  
ANGLO-AMERICAN-DIRECT UNITED STATES  
CABLEGRAM

Prefix ——— Code ——— SENT. For Stamps.  
Words. Charge At ————— This form will be ac-  
To ——— By ——— cepted at all Post Office  
Telegraph Stations.

VIA WESTERN UNION

To Prevent Mistakes Please Write Distinctly.

To "ROLPHGREEN,"  
SAN FRANCISCO.

NOT TO BE  
TELEGRAPHED.

Having read the conditions printed on the back here-  
of, I request that the above telegram be forwarded by  
the Western Union Telegraph-Cable System, subject to  
the said conditions to which I agree.

F. G. GREEN & CO.

Signature: F. GREEN & CO. Address: F. GREEN &  
CO., 13, Fenchurch Avenue, London, E. C.

Cable Addresses Registered in Any Part of the World, or With Any Com-  
pany, are Available Over the Lines of the Western Union Telegraph-  
Cable System. [27]

**THE WESTERN UNION TELEGRAPH-CABLE SYSTEM.**

The Largest Telegraph and Cable System in Existence.

8 DUPEXED ATLANTIC CABLES.

OVER 25,000 OFFICES AND 1,500,000 MILES OF WIRE.

Direct Wires from Cable Stations to all the principal commercial centres in Great Britain, United States and Canada, and Direct connection with Central America, West Indies, South America, Australia, New Zealand, Fanning, Fiji, and Norfolk Islands.

**DIRECT AND EXCLUSIVE CONNECTION WITH MEXICO.**

**RECEIVING OFFICES IN THE UNITED KINGDOM:—**

	Telephone Nos.		Telephone Nos.
<b>LONDON:</b> 1, Old Broad Street, E. C.....	3761		
63, Old Broad Street, E. C.....	3316		
48a, Gresham House, Old Broad St., E. C..	704	<b>LIVERPOOL:</b> D. 6, Exchange Buildings.....	2274 Central
142a, Winchester H'se, Old Broad St., E. C.	1368	Cotton Exchange .....	(Private Branch Exchange)
21, Royal Exchange, E. C.....	9117		
39, 40, Mark Lane, E. C. 1070, 1384 Avenue .....	3762	<b>BRISTOL:</b> Canada House, Baldwin Street.....	309
East India Avenue, E. C.....	3763, 614		
The Baltic, St. Mary Axe, E. C.....	976	<b>BRADFORD:</b> 10, Forster Square .....	771
34, Throgmorton Street, E. C.....	6974	<b>DUNDEE:</b> 1, Panmure Street.....	1351
1, Drapers' Gardens, E. C.....	1368	<b>EDINBURGH:</b> 50, Frederick Street .....	400
109, Fenchurch Street, E. C.....	1830		
10, Holborn Viaduct, E. C.....	1050	<b>GLASGOW:</b> 23, Waterloo Street.....	771 Central
Effingham House, Arundel Street, W. C. ....	4119		(Private Branch Exchange)
34, 35, Southampton Street, Strand, W. C. ....	1713		600
2, Charing Cross, S. W.....	1155	<b>LEITH:</b> Exchange Buildings .....	600
5, Royal Opera Arcade, Pall Mall, S. W. ....	3598	<b>MANCHESTER:</b> 31, Brown Street.....	1455
34, Victoria Street, S. W.....	2073	<b>NEWCASTLE-ON-TYNE:</b> 1, Side .....	1329
	3716	<b>WEST HARTLEPOOL:</b> Exchange Buildings.....	789
	094	Mainsforth Terrace	



General Offices — 26, OLD BROAD STREET, LONDON, E. C.  
Telephone No.: 5261 Wall (Private Branch Exchange).

PRINCIPAL CONTINENTAL OFFICES AND AGENCIES:

ANTWERP:	4, Avenue De Keyser.	MADRID:	Calle Valenzuela 10.
"	49, Canal des Recollets.	NAPLES:	Via Marina Nuova, 14/18.
AMSTERDAM:	4, Weesperzijde.	PARIS:	1, Rue Auber.
BARCELONA:	57, Calle Caspe.	"	37, Rue Caumartin.
"	96, Paseo de Gracia.	ROME:	49/50, Piazza di Spagna.
CHRISTIANA:	4, Prinsensgade.	STOCKHOLM:	Drottninggatan 3.
COPENHAGEN:	Vesterbrogade 19.	VIENNA:	IV. Stumpergasse, 48.
HAVRE:	118, Boulevard Strasbourg.	ZURICH:	Pelikanstrasse, 22.
HAMBURG:	4, Grosse Allee.		

The public are recommended to hand in their Telegrams at the Company's Stations, where free receipts are given for the amounts charged.

Telegrams for this Company's Cables are also received at all Post Office Telegraph Stations; but in order to insure transmission by the Western Union Telegraph-Cable System, the forms upon which Telegrams are written should be marked "Via Western Union," "Via Anglo," or "Via Direct." This indication is signalled free of charge.

Cable addresses are registered free of charge.

All important Telegrams should be repeated, for which an additional quarter rate is charged.

CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED IF IT BE HANDED IN AT AN OFFICE  
OF THE WESTERN UNION TELEGRAPH-CABLE SYSTEM.

The Company may decline to forward the Telegram, though it has been received for transmission; but in case of so doing shall refund to the Sender the amount paid for the transmission of the Telegram.

The Company will refund to the Sender the charges paid by him for any Telegram which through the fault of the Telegraph Services has experienced serious delay or fails to reach the Addressee, or which owing to errors made in transmission has manifestly not fulfilled its object.

The Company shall not be liable to make compensation, beyond the amount to be refunded as above, for any loss, injury or damage, arising or resulting from the non-transmission or non-delivery of the Telegram, or delay, or error in the transmission or delivery thereof, howsoever such non-transmission, non-delivery, delay or error shall have occurred.

The control of the Company over the Telegram shall be deemed to have entirely ceased at any point where in the course of the transit of the Telegram to its destination it may be entrusted by the Company (and the Company shall have full power so to entrust the Telegram) to any other system, service, or line of telegraph for further transmission.

**CONDITIONS ON WHICH THIS TELEGRAM IS ACCEPTED BY THE POSTMASTER-GENERAL IF IT BE HANDED IN AT A PUBLIC TELEGRAPH OFFICE IN THE UNITED KINGDOM.**

1. Either the Postmaster-General or any Telegraph Company or Foreign Government, by whom this Telegram is or would in the ordinary course of the Telegraphic Service be forwarded may decline to forward the Telegram although it has been received for that purpose; but in such case the amount paid for transmission shall be refunded to the Sender at his request.
2. Neither the Postmaster-General nor any Telegraph Company or Foreign Government, by whom this Telegram is or would in the ordinary course of the Telegraphic Service be forwarded, shall be liable to make compensation for any loss, injury, or damage arising or resulting from non-transmission or non-delivery of the Telegram, or delay, or error, or omission in the transmission or delivery thereof, through whatever cause such non-transmission, non-delivery, delay, error, or omission shall have occurred.
3. This Telegram shall be forwarded in all respects in accordance with the provisions of the Regulations made pursuant to the Telegraph Acts, 1863 to 1911, and the provisions of such Regulations § shall be deemed to be binding not only between the Sender and the Postmaster-General, but between the Sender and any Telegraph Company or Foreign Government by whom this Telegram is or would in the ordinary course of the Telegraphic Service be forwarded.

§ The substance of these Regulations will be found in the Post Office Guide. [28]

[Endorsed]: Filed Dec. 20, 1920. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [29]

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(Title of Court and Cause.)

**Judgment.**

This cause having come on regularly for trial upon the 25th day of May, 1920, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, and counsel having stipulated that the cause stand submitted on an agreed statement of facts and on briefs to be filed, and the Court after due deliberation, having filed its opinion and ordered that judgment be entered in favor of the defendant and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiffs take nothing by this action and that defendant go hereof without day and that said defendant do have and recover of and from said plaintiffs its costs herein expended taxed at \$ —.

Judgment entered March 1, 1921.

WALTER B. MALING,  
Clerk. [30]

(Title of Court and Cause.)

**Opinion.**

ANDROS & HENGSTLER, of San Francisco, Attorneys for Plaintiffs.

BEVERLY L. HODGHEAD, of San Francisco, Attorney for Defendant.

FRANCIS R. STARK, of New York, of Counsel.

RUDKIN, District Judge:

This is an action to recover damages for a mistake in the transmission of a telegram. A jury was waived and the cause submitted to the Court on an agreed statement of facts. From this agreed statement it appears that on and prior to the 24th day of February, 1916, F. Green & Co. of London were negotiating on behalf of the plaintiffs for the sale of a cargo of barley. On the latter date the plaintiffs wired Green & Co. offering the cargo at sixty-three shillings and nine pence per quarter including war risk insurance, meaning thereby that the plaintiffs would pay such insurance. On the following day the offer was rejected and Green & Co. submitted a counter offer of sixty-two shillings per quarter, if delivered not easterly of Southampton, and sixty-two shillings and six pence per quarter, if delivered not north of Ipswich, including war risk insurance, meaning thereby that the insurance should be paid by the plaintiffs as in the first offer. This message was transmitted correctly by cable from London to New York but in its transmission

by the defendant from New York to San Francisco the word "not" was inserted before the word "including war risk." Under the telegram as filed with the telegraph company for transmission, therefore, the plaintiffs were to pay the war risk insurance while under the telegram as delivered the insurance was to be borne by the purchaser or purchasers. This counter offer was accepted by the plaintiffs without [31] notice or knowledge of the mistake in the transmission of the telegram and the barley was sold and delivered to the purchaser. By reason of the mistake in the telegram the plaintiffs were afterwards compelled to bear and pay the war risk insurance amounting to Sixty-nine Hundred Seventy Dollars and Fifty-four Cents (\$6,970.54), and the present action was instituted against the telegraph company to recover that amount.

Aside from the foregoing the only reference in the agreed statement to the damages sustained or the market value of the barley is the following: That the plaintiffs made a profit of Thirty Thousand Dollars (\$30,000.00) on the sale of the cargo.

"That there was no particular market price for Superior Barley on or about the 25th February, 1916, but the price stated in said message set forth in paragraph VI, was the best price which said F. Green & Co. could secure at that date.

"That George U. Hind, one of the plaintiffs, if called as a witness, would testify that plaintiffs would not have accepted said offer set forth in the message set forth in paragraph VI, whereby plain-

tiffs were to pay said war risk insurance, had said message been transmitted to plaintiffs as filed by said F. Green & Co.”

Paragraph VI referred to in the stipulation is the paragraph which contains the counter offer of Green & Co. as filed with the telegraph company for transmission. The agreed statement contains some other facts in reference to the failure to repeat the message but for reasons hereinafter stated I do not deem it necessary to consider that question. The plaintiffs contend that they are entitled to recover the amount of the war risk insurance paid by them, while the defendant contends that the plaintiffs have suffered no loss. This latter contention must be sustained. Surely the measure [32] of damages in this class of actions cannot be and is not the difference between what the seller receives for his property and what he thought he was going to receive. There is nothing in the record to indicate, even remotely, that the intending purchaser or any other purchaser would have paid more for the barley than was actually paid. And assuming that one of the plaintiffs would testify that the offer as made would not have been accepted, and assuming that such testimony was competent and that such was the fact there is nothing to indicate that the plaintiffs were damaged in any such sum or in any amount.

As said by the Supreme Court of this State in *Acheson vs. Western Union Tel. Co.*, 96 Cal. 641, “No damage, unless nominal, necessarily resulted from the alleged breach of contract. There is

nothing to show that plaintiff suffered any loss because he did not buy the hops at the named price; he may have saved money by not making the purchase.” Again, in *Western Union Tel. Co. vs. Hall*, 124 U. S. 444-454, the Court said: “If the order had been executed on the day when the message should have been delivered, there is nothing in the record to show whether the oil purchased would have been sold on the plaintiff’s account on the next day or not; or that it was to be bought for resale. There was no order to sell it, and whether or not the plaintiff would or would not have sold is altogether uncertain. If he had not done so, and had continued to hold the oil bought, there is also nothing in the record to show whether, up to the time of the bringing of the action, he would or would not have made a profit or suffered a loss, for it is not disclosed in the record whether during that period the price of oil advanced or receded from the price at the date of the intended purchase.”

So here, there is nothing in the record to show that the plaintiffs could have obtained a higher price for the barley up to the time of the commencement of this action or even up to the present day. On the other hand, if they would have held or [33] kept the barley for their own use there is nothing in the record to indicate that they could not have purchased barley of like kind and quality even at a less price than that actually received. In other words, for aught that appears in the record the plaintiffs may have profited greatly by the mistake.

For these reasons it seems apparent to me that the

plaintiffs have suffered no loss and that there can be no recovery. Possibly the plaintiffs are entitled to recover the amount paid for sending the telegram but no such issue is presented by the pleadings.

The finding of the Court is, therefore, for the defendant and judgment will be entered accordingly.

[Endorsed]: Filed Mch. 1, 1921.    Walter B. Mal-  
ing, Clerk.    [34]

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(Title of Court and Cause.)

**Petition for Writ of Error.**

The plaintiffs in the above-entitled action, feeling themselves aggrieved by the judgment entered on the first day of March, 1921, in said action, come now by Andros & Hengstler, their attorneys, and petition the above-entitled court for an order allowing said plaintiffs to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided.

And your petitioners will ever pray.

ANDROS & HENGSTLER,  
Attorneys for Plaintiffs.

Due service and receipt of a copy of the within petition is hereby admitted this 6th day of April, 1921.

BEVERLY L. HODGHEAD,  
Attorney for Defendant.



[Endorsed]: Filed Apr. 29, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

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(Title of Court and Cause.)

**Assignment of Errors.**

Plaintiffs above named assign the following errors upon which they will rely upon the review on writ of error to the United States Circuit Court of Appeals, Ninth Circuit, of the judgment given by this Court in this cause:

The Court erred in deciding and adjudging in favor of defendant upon, and deducing from and making the following conclusions of law from, the agreed statement of facts placed of record by the parties herein, (the same being the agreed statement of facts mentioned and referred to in and by the judgment and opinion of the Court rendered in this case), viz:

**I.**

The Court erred in sustaining the contention of defendant that the plaintiffs have suffered no loss.

**II.**

The Court erred in deciding that in this case the measure of damages is not the difference between what the seller receives for his property and what he thought he was going to receive.

**III.**

The Court erred in deciding that there is nothing to indicate in this case that the plaintiffs were damaged in any such sum or in any amount.

IV.

The Court erred in deciding that for aught that appears in the record the plaintiffs may have profited greatly by the mistake of defendant.

V.

The Court erred in deciding that the plaintiffs have suffered no loss and that there can be no recovery.

VI.

The Court erred in giving and entering judgment for the [36] defendant in said action, and against said plaintiffs.

WHEREFORE, plaintiffs pray that the judgment of said Court be reversed, and that judgment be ordered in favor of the plaintiffs as prayed for in their complaint.

ANDROS & HENGSTLER,

Attorneys for Plaintiffs.

Due service and receipt of a copy of the within assignment is hereby admitted this 6th day of April 1921.

BEVERLY L. HODGHEAD,

Attorney for Defendant.

[Endorsed]: Filed Apr. 29, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [37]

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(Title of Court and Cause.)

**Order Allowing Writ of Error.**

Upon the motion of Andros & Hengstler, attorneys for the plaintiffs in the above-entitled action, and

upon filing a petition for writ of error, together with an assignment of errors,

IT IS HEREBY ORDERED that a writ of error be, and is hereby, allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment entered herein on the first day of March, A. D. 1921.

Done in open court this 29th day of April, 1921.

WM. C. VAN FLEET,  
District Judge.

[Endorsed]: Filed Apr. 29, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [38]

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(Title of Court and Cause.)

**Stipulation as to Bill of Exceptions.**

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that for the purpose of making up a record to be used on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, the stipulation of agreed facts upon which said cause was submitted to the above-entitled court, may be inserted in said record to be used on writ of error in lieu of a bill of exceptions, and shall be considered as a bill of exceptions, and that no other bill of exceptions or proposed bill of exceptions shall be required to be filed by plaintiffs above named in order to prosecute said writ of error.

Dated at San Francisco, California, May 9th, 1921.

BEVERLY L. HODGHEAD,  
Attorney for Defendant.  
ANDROS & HENGSTLER,  
Attorneys for Plaintiffs.

It is so ordered.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed May 10, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

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(Title of Court and Cause.)

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that we, George U. Hind and James Rolph, Jr., as principals, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto Western Union Telegraph Company, a corporation, defendant above named, in the sum of Three Hundred Dollars (\$300.00), to be paid to the said Western Union Telegraph Company, a corporation, its successors, representatives or assigns, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated the 9th day of May, A. D. 1921.

WHEREAS the above-named plaintiffs have sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the Southern Division of the Northern District of California, Second Division.

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiffs shall prosecute said writ to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

IT IS EXPRESSLY AGREED by said surety that in case of a breach of any condition of this bond, the above-entitled court may, upon notice to said surety of not less than ten days, proceed summarily in the said action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety, and [40] award execution therefor.

GEO. U. HIND,

JAMES ROLPH, Jr.,

Principals.

NATIONAL SURETY COMPANY, (Seal)

Surety.

By F. J. CRISP,

Attorney in Fact.

The foregoing bond may be approved as to form, amount, and sufficiency of surety.

BEVERLY L. HODGHEAD,

Attorney for Defendant.

State of California,  
City and County of San Francisco,—ss.

On this 9th day of May, in the year one thousand nine hundred and twenty-one, before me, John McCallan, a Notary Public in and for the city and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared F. J. Crisp known to me to be the person whose name is subscribed to the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said F. J. Crisp acknowledged to me that he subscribed the name of the National Surety Company thereto as Principal and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,  
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is hereby approved this 10th day of May, 1921.

WM. C. VAN FLEET,  
Judge.

The premium charged for this bond is Ten Dollars per annum.

[Endorsed]: Filed May 10, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [41]

(Title of Court and Cause.)

**Praeipice for Record on Writ of Error.**

To the Clerk of said Court:

Sir: Please prepare transcript on writ of error as follows:

Complaint.

Amended answer.

Stipulation as to facts.

Stipulation as to certain facts.

Opinion.

Judgment.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Stipulation as to bill of exceptions.

Bond on writ of error.

Writ of error.

Citation.

Praeipice.

ANDROS & HENGSTLER,  
Attorneys for Plaintiffs.

[Endorsed]: Filed May 11, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [42]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,059.

GEORGE U. HIND and JAMES ROLPH,, Jr.,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing forty-two (42) pages, numbered from 1 to 42, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$18.60; that said amount was paid by the plaintiffs, and that the original writ of error and citation issued in said cause are hereto annexed.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 26th day of May, A. D. 1921.

[Seal] WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [43]

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**Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between George U. Hind and James Rolph, Jr., plaintiffs in error, and Western Union Telegraph Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said George U. Hind and James Rolph, Jr., plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send this record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within

thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 10th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,  
United States District Judge.

Due service and receipt of a copy of the within writ of error is hereby admitted this 12th day of May, 1921.

BEVERLY L. HODGHEAD,  
Attorney for the Defendant in Error.

[Endorsed]: No. 16,059. United States District Court for the Northern District of California, Second Division. *George U. Hind and James Rolph, Jr.,* Plaintiffs in Error, vs. *Western Union Telegraph Company,* Defendant in Error. Writ of Error. Filed May 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [44]

**Return to Writ of Error.**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal]

WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [45]

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**Citation on Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Western Union Telegraph Company, a Corporation,  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern

District of California, Second Division, wherein George U. Hind and James Rolph, Jr., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 10th day of May, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge.

Due service and receipt of a copy of the within citation on writ of error is hereby admitted this 12th day of May, 1921.

BEVERLY L. HODGHEAD,  
Attorney for Defendant in Error.

[Endorsed]: No. 16,059. United States District Court for the Northern District of California, Second Division. George U. Hind and James Rolph, Jr., Plaintiffs in Error, vs. Western Union Telegraph Company, Defendant in Error. Citation on Writ of Error. Filed May 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

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[Endorsed]: No. 3690. United States Circuit Court of Appeals for the Ninth Circuit. George U. Hind and James Rolph, Jr., Plaintiffs in Error, vs.

Western Union Telegraph Company, a Corporation,  
Defendant in Error. Transcript of Record. Upon  
Writ of Error to the Southern Division of the United  
States District Court of the Northern District of  
California, Second Division.

Filed May 26, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

